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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1446

JOAN ROE, PETER POE, AND COE PRESS, INC.,
*Petitioners,*

v.

JANE DOE,
*Respondent.*

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**On Writ of Certiorari to the Court of Appeals of the State of New York**

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PSYCHOANALYTIC ASSOCIATION, AND THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION

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## INDEX


| | Page |
|---|---|
| MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* | 1 |
| STATEMENT OF INTEREST OF *AMICI CURIAE* | 2 |
| STATEMENT OF THE CASE | 4 |
| INTRODUCTION AND SUMMARY OF THE ARGUMENT | 9 |
| ARGUMENT: | |
| I. The Writ of *Certiorari* Should Be Dismissed | 13 |
| A. This Court Lacks Jurisdiction | 13 |
| B. The Writ Was Improvidently Granted | 18 |
| II. An Injunction Based on a Private Cause of Action for Breach of the Confidentiality Owed by Psychotherapist to Patient Is Not an Unconstitutional Prior Restraint | 27 |
| A. Respondent Did Not Consent to Publication and She Is Identifiable | 28 |
| B. A Publication in Violation of the Psychotherapist-Patient Agreement of Confidentiality Is Not Constitutionally Protected Speech | 31 |
| C. No Valid Constitutional Purpose Would Be Served by Permitting a Damage Remedy But Prohibiting Injunctive Relief | 43 |
| CONCLUSION | 47 |

## TABLE OF AUTHORITIES

*Cases*: Page

*Abelson's Inc.* v. *New Jersey State Board of Optometrists*, 5 N.J. 412, 75 A.2d 867 (1950) ..... 23
*Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) ..... 14
*Baker* v. *Libbie*, 210 Mass. 599, 97 N.E. 109 (1912) ..... 42
*Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) ..... 43
*Berry* v. *Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958) ..... 31
*Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 195 (1968) ..... 44, 46
*Catlin Trustees* v. *United States*, 324 U.S. 229 (1945) ..... 13
*Clark* v. *Geraci*, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (1960) ..... 23, 31
*Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E.2d 610 (1969), cert. denied, 398 U.S. 960 (1970) ..... 43
*Cox Broadcasting Corp.* v. *Cohn*, 415 U.S. 912 (1974) ..... 25
*Doe* v. *Bolton*, 410 U.S. 179 (1973) ..... 26
*Duncan* v. *Louisiana*, 391 U.S. 145 (1968) ..... 45
*E. I. DuPont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100 (1917) ..... 41
*Estate of Hemingway* v. *Random House*, 23 N.Y. 2d 341, 244 N.E.2d 250 (1968) ..... 42
*E. W. Bliss Co.* v. *United States*, 248 U.S. 37 (1918) ..... 41
*Felis* v. *Greenberg*, 51 Misc. 2d 881, 273 N.Y.S. 2d 288 (1966) ..... 23, 31
*Freedman* v. *Maryland*, 380 U.S. 51 (1965) ..... 44, 46
*Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920) ..... 21
*Fox Film Corp.* v. *Muller*, 294 U.S. 696 (1935) ..... 18
*Gallela* v. *Onassis*, 353 F. Supp. 196 (S.D. N.Y. 1972), aff'd, 487 F.2d 986 (2d Cir. 1973) ..... 21, 22, 23

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 94 Sup. Ct. 2997 (1974) | 40 |
| *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 481 (1911) | 24 |
| *Gospel Army* v. *City of Los Angeles*, 331 U.S. 534 (1947) | 13 |
| *Griffin* v. *Medical Society of New York*, 7 Misc. 2d 549, 11 N.Y.S.2d 109 (1939) | 21 |
| *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) | 20 |
| *Hammonds* v. *Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (N.D. Ohio 1965) | 31, 32, 33-34 |
| *Hague* v. *Williams*, 37 N.J. 328, 181 A.2d 345 (1962) | 31 |
| *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964) | 13 |
| *Johnson* v. *Massachusetts*, 390 U.S. 511 (1968) | 19 |
| *Kewanee Oil Co.* v. *Bicron Corp.*, —— U.S. ——, 94 S.Ct. 1879 (1974) | 41-42 |
| *Kimbrough* v. *United States*, 364 U.S. 661 (1961) | 19 |
| *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957) | 45, 46 |
| *Local 438 Construction and General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542 (1963) | 14 |
| *Maas* v. *United States*, 371 F.2d 348 (D.C. Cir. 1966) | 15 |
| *Marcus* v. *Search Warrants*, 367 U.S. 716 (1961) | 46 |
| *Massachusetts* v. *Painten*, 389 U.S. 560 (1968) | 19 |
| *Mills* v. *Alabama*, 384 U.S. 214 (1966) | 39 |
| *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) | 19 |
| *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) | 26 |
| *Nader* v. *General Motors Corp.*, 31 App. Div. 2d 392, 298 N.Y.S.2d 137 (1969), aff'd, 25 N.Y.2d 560, 255 N.E.2d 765 (1970) | 20, 21 |
| *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) | 24 |
| *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) | 40, 43, 44, 45-46 |

TABLE OF AUTHORITIES—Continued

Page

*New York Times Co.* v. *United States*, 403 U.S. 713 (1971) ..... 39, 40, 45
*New York Times, Inc.* v. *Sullivan*, 376 U.S. 254 (1964) ..... 39, 40
*North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 159 (1973) ..... 13
*Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971) ..... 14-18, 33, 43, 45
*Peay* v. *Curtis Publishing Co.*, 78 F. Supp. 305 (D.D.C. 1948) ..... 42
*Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) ..... 24, 43, 44
*Quarles* v. *Sutherland*, 215 Tenn. 651, 389 S.W.2d 249 (1965) ..... 32
*Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945) ..... 13
*Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) ..... 21, 22
*Roe* v. *Ingraham*, 480 F.2d 102 (2d Cir. 1973) ..... 26
*Roe* v. *Wade*, 410 U.S. 113 (1973) ..... 20
*Rosenblatt* v. *American Cyanamid Co.*, 86 S.Ct. 1 (1965) ..... 17
*Rosenblatt* v. *Baer*, 383 U.S. 75 (1966) ..... 39
*St. Louis I.M.& S. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24 (1883) ..... 13
*Shelly* v. *Kraemer*, 334 U.S. 1 (1948) ..... 23
*Sidis* v. *F-R Pub. Corp.*, 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940) ..... 25
*Simonsen* v. *Swenson*, 104 Neb. 224, 177 N.W. 831 (1920) ..... 23, 31
*Smith* v. *Driscoll*, 94 Wash. 441, 162 Pac. 572 (1917) ..... 31
*Smith* v. *Mississippi*, 373 U.S. 238 (1963) ..... 19
*Taylor* v. *United States*, 222 F.2d 398 (D.C. Cir. 1955) ..... 34
*Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) ..... 17, 22, 24-25, 33
*United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) ..... 42-43

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Wainwright* v. *City of New Orleans*, 392 U.S. 598 (1968) | 19 |
| *Whitus* v. *Georgia*, 385 U.S. 545 (1967) | 18 |
| *Constitution*: | |
| First Amendment | 9, 11, 12, 17, 18, 23, 24, 27, 34, 38-44 |
| Fourteenth Amendment | 9 |
| *Statutes*: | |
| 28 U.S.C. § 1257(3) | 2, 11, 13, 17 |
| New York Civil Practice Law & Rules § 4504(a) | 22, 38 |
| New York Civil Rights Law §§ 50, 51 | 20, 31 |
| New York Code of Rules and Regulations, Vol. 8, § 60.1 | 22 |
| New York Education Law §§ 6509-6511 | 22 |
| *Miscellaneous*: | |
| Alverson, "Privilege and Confidentiality" [speech before the Connecticut Mental Health Association (June 1968)] | 37-38 |
| American Medical Association Principles of Medical Ethics, Opinions and Reports of the Judicial Council (1969) | 32 |
| Annotation, Physician's Tort Liability, Apart From Defamation, for Unauthorized Disclosure of Confidential Information About Patient, 20 A.L.R.3d 1109 (1968) | 23, 31 |
| Bloustein, "Privacy, Tort Law and the Constitution—Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?" 46 Tex. L. Rev. 611 (1968) | 25 |
| Boskey, "Finality of State Judgments Under the Federal Judicial Code," 43 Colum. L. Rev. 1002 (1943) | 13 |
| Crick, "The Final Judgment as a Basis for Appeal," 41 Yale L. J. 539 (1932) | 13 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Ewalt & Farnsworth, *Textbook of Psychiatry* (1963) | 38 |
| Franklin, "A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting Fact," 16 Stan. L. Rev. 107 (1964) | 25 |
| Freud, "The Interpretation of Dreams," in 4 *Standard Edition of the Complete Psychological Works of Sigmund Freud* (1958) | 5, 35 |
| Freund, "Privacy: One Concept or Many" in Pennock & Chapman, eds., *Privacy* (1971) | 36 |
| Freund, "The Supreme Court and Civil Liberties," 4 Vand. L. Rev. 533 (1951) | 45 |
| Fried, "Privacy," 77 Yale L. J. 475 (1968) | 36, 37 |
| Goffman, *The Presentation of Self in Everyday Life* (1959) | 36 |
| Goffman, *Encounters* (1961) | 36 |
| Goffman, *Behavior in Public Places* (1963) | 36 |
| Gross, "Privacy and Autonomy," in Pennock & Chapman, eds., *Privacy* (1971) | 36 |
| Group for the Advancement of Psychiatry, Report No. 45 (1960) | 33, 38 |
| Jourard, "Some Psychological Aspects of Privacy," 31 Law & Contemp. Prob. 307 (1966) | 36 |
| Kalven, "The New York Times Case: A Note on the 'Central Meaning of the First Amendment,'" 1964 Sup. Ct. Rev. 191 | 39 |
| Kalven, "Privacy in Tort Law—Were Warren and Brandeis Wrong?" 31 Law & Contemp. Prob. 326 (1966) | 25 |
| Katz, *Experimentation With Human Beings* (1972) | 32 |
| Katz, "Levels of Confidentiality in the Psychoanalytic Situation," 20 J.A.M.A. 162 (1972) | 38 |
| Laing & Estherson, *Sanity, Madness and the Family* (1964) | 41 |
| Laing, *The Divided Self* (1965) | 41 |
| Meiklejohn, "The First Amendment Is An Absolute," 1961 Sup. Ct. Rev. 245 | 39 |

TABLE OF AUTHORITIES—Continued

Page

Nimmer, "The Right to Speak From *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy," 56 Calif. L. Rev. 935 (1968) ..... 25

Office of Science and Technology, *Privacy and Behavorial Research* (1967) ..... 37

Proposed Rules of Federal Evidence, Rule 504 (1972) ..... 38

Slovenko, *Psychotherapy, Confidentiality, and Privileged Communication* (1966) ..... 30, 35, 36, 40

Note, "Action for Breach of Medical Secrecy Outside the Courtroom," 36 U. Cinn. L. Rev. 103 (1967) ..... 32

Note, "Extrajudicial Truthful Disclosure of Medical Confidences: A Physician's Civil Liability," 44 Den. L. J. 463 (1967) ..... 31-32

Note, "Medical Practice and the Right to Privacy," 43 Minn. L. Rev. 943 (1959) ..... 32

Note, "Personal Letters: In Need of a Law of Their Own," 44 Iowa L. Rev. 705 (1959) ..... 42

Note, 79 Harv. L. Rev. 1723 (1966) ..... 32

Note, 11 Villanova L. Rev. 662 (1966) ..... 32

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### MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Counsel for the American Psychiatric Association, the American Psychoanalytic Association, and the American Orthopsychiatric Association hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioners was requested but denied.

The instant case presents for resolution a conflict between a psychiatrist's right to publish a case study based on a patient's psychotherapeutic treatment and the patient's right to prevent disclosure of confidential communications made during treatment. Collectively, the above organizations represent more than 25,000 mental health professionals, almost all of whom are medical doctors practicing psychiatry. These organizations, therefore, have a unique interest both in the advancement of scientific knowledge through the publication of case studies, and in the need for confidentiality in fostering a climate that will encourage patients to seek treatment.

The above organizations believe that because of the fundamental values at stake, and in view of the inadequacy of the record below, this Court should dismiss the writ of *certiorari* either as improvidently granted, or because the preliminary injunction issued below is not a final judgment as required for this Court's jurisdiction under 28 U.S.C. § 1257. Petitioners have not addressed these issues in their brief, and counsel for the above organizations has been informed that respondent will not discuss them either.

Moreover, the above organizations believe that they can apprise this Court of the nature of the psychotherapeutic process, the importance of confidentiality to that process, and the customary professional standards used in the publication of case studies. All of these factors are critically relevant to this Court's determinations, and the above organizations believe that they will not be adequately briefed either by petitioners or respondent.

## STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Psychiatric Association is a professional organization with a nationwide membership of more than 20,000 doctors of medicine who specialize in the treat-

ment and care of mental illness. The American Psychoanalytic Association is a professional organization with over 2,000 members nationally, almost all of whom are medical doctors, and all of whom have received special training in psychoanalytic theory and practice. The American Orthopsychiatric Association is a professional organization with a national membership of more than 4,000 psychiatrists, psychologists, psychiatric social workers, and persons in related fields who are concerned with the problems of mental health treatment. All three organizations are not-for-profit corporations.

Collectively *amici* have a strong commitment to the care and treatment of those in this country who need mental health assistance. The most effective way to insure adequate mental health care is to allow for early and preventive treatment on a voluntary basis before hospitalization becomes necessary. Thus, *amici* wish to foster an atmosphere that will encourage people to seek psychiatric assistance. To establish such an atmosphere requires strict assurance of professional confidentiality because patients in psychotherapy are often required to disclose intimate and embarrassing acts, thoughts, feelings and fantasies. These revelations include material that belongs to people's irrational and primitive selves, and which people often quite appropriately decline to share even with their closest loved ones. Indeed, some of these matters are so painful to the patient himself that they have been repressed—*i.e.*, removed from his own conscious memory and stored in his unconscious. In the therapeutic process this intimate and painful material is brought to consciousness and articulated only because it is essential for treatment. If, however, this material were disclosed to family, colleagues or friends the result would be devastating. Thus, unless assured of absolute confidentiality patients will be unwilling to seek the psychotherapeutic treatment necessary for restoration of mental health.

*Amici* also have a keen interest in the advancement of scientific learning through the publication of case studies. The case study is a unique method of presentation because it allows for detailed explication of therapeutic techniques in the context of real, rather than hypothetical, patient responses. Commencing with Freud, great contributions to our knowledge of mental processes have resulted from this form of presentation.

The instant case presents for resolution a conflict between the assurance of confidentiality required for effective psychotherapy, and the ability to propogate ideas through publication. *Amici* strongly support both of these competing values and seek to assist the Court in resolving this conflict so that neither value will be harmed any more than is absolutely essential.

## STATEMENT OF THE CASE

Petitioners [defendants below] seek reversal of a preliminary injunction issued by the New York courts prohibiting distribution of a book entitled *In Search of a Response*. The book was co-authored by petitioners Dr. Roe and her husband, Peter Poe, and published by petitioner Coe Press. It is based on the psychiatric treatment of three former patients of Dr. Roe—respondent Jane Doe [plaintiff below], her ex-husband, who is now deceased, and her son.

### Relationship Between Respondent and Dr. Roe.

Beginning in 1956, and continuing for more than six years thereafter, respondent, her husband, and son, were patients of Dr. Roe's who is licensed to practice psychiatry in New York. Respondent and her husband were treated separately, each usually meeting with Dr. Roe for three hourly sessions per week. At these sessions they were encouraged to express any thoughts or feelings, no

matter how discomforting or embarrassing.[1] The patients were also treated by Dr. Roe in group therapy, and it appears that Dr. Roe was a professional supervisor to respondent, who herself is a practicing therapist. (See *In Search of a Response*, Helena section at 354 n. 673.) Respondent's son saw Dr. Roe only occasionally, and the nature of his treatment is undisclosed.

While treating respondent's family, Dr. Roe prepared a manuscript based on their treatment. This manuscript was shown to respondent and her husband, and, as indicated in the book, was discussed during therapy sessions. Nevertheless, it was not published for more than ten years after termination of respondent's and her husband's treatment. "The delay," according to the affidavit of petitioners Roe and Poe, "is attributed to a number of factors, including our own desire for time to pass, the desire of plaintiff's late husband to postpone publication until after his admission to the Bar, the pressures of other professional responsibilities, and the extreme care and solicitude which we regarded as essential to the final editing and preparation of this work. . . ." (App. at 32.)[2] During this passage of time, respondent's then ex-husband died.

Respondent claims that in 1972 she learned from a colleague that Dr. Roe was about to publish a book. When the book was described to respondent, she recognized it as the manuscript that had been based on her family's treatment. Respondent's attorney thereupon wrote to Dr. Roe requesting an opportunity to view the

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[1] This technique, called "free association," requires the patient "to communicate every idea or thought that occur[s] to [him]. . . . It is necessary to insist explicitly on [the patient's] removing all intrusion of the thoughts that he perceives." Freud, "The Interpretation of Dreams," in 4 *Standard Edition of the Complete Psychological Works of Sigmund Freud* 100-101 (1958).

[2] *Amici* have been furnished a copy of the record below with respondent's name deleted.

proposed book "so that I can determine whether there has been a violation of your obligation not to reveal privileged communications between a doctor and patient, and further, whether your manuscript contains any libelous material or references." (App. at 20.) Dr. Roe replied that respondent "apparently has heard rumors that I am publishing a book and has assumed that it is about her." (App. at 21.) The letter then stated that the manuscript in question had already been given to respondent during treatment and that, at that time, she had consented to publication. The book was published approximately four months after the date of Dr. Roe's letter.

According to petitioner Poe, who is Dr. Roe's husband and co-author, and who himself is a practicing lay psychotherapist, the book is a diary of respondent and her husband based "on the notes, reproduced as closely as possible, of hundreds of therapeutic sessions." (*In Search of a Response* at viii.) The book consists of three sections. The first section is a brief internal monologue supposedly by respondent's son, who is labeled "autistic." It is essentially an imagined view of the child's feelings during his infancy and early childhood, emphasizing the failure of communication within the family, but particularly between mother and son. The second section of the book is a 354-page account of respondent's treatment. The patient is variously described as suffering from "post-partum psychosis," "schizophrenia," "catatonia," and "paranoid schizophrenia." (*E.g.*, *In Search of a Response*, Helena section at 8 n. 26, 26 n. 96, 91 n. 251, and 109 n. 302.) The final section is a 613-page account of the husband's treatment. He, too, is described as a "schizophrenic." (*E.g.*, *id.*, Henry section at 25 n. 61.) The sections concerning respondent and her husband are written as if the patients were talking to the doctor in a free-associative manner, with very few brief interruptions—written in italics and placed in parenthesis

—for questions and comments by the psychiatrist. There are also close to 2000 footnotes providing brief explanations by the authors of the patients' statements.

The subject matter of the patients' disclosures is often exceptionally intimate and personal. Respondent, for example, discusses at length her pre-marital sexual experiences, marital sexual experiences, extra-marital sexual experiences, post-marital sexual experiences, masturbatory experiences, homosexual fantasies, incestuous fantasies and feelings, excretory fantasies and feelings, sadistic fantasies, and violent acts and feelings.[3] The only efforts to disguise the patients appear to have been the changing of their names and the names of people discussed by them, and the portrayal of the patients as the parents of a single child when in fact they had two children.[4] Numerous identifying characteristics remain: age, religion, educational institutions attended, professional interests and accomplishments, the patients' divorce, the husband's remarriage to a female attorney, the son's autism, his early interest in music, and a suicide attempt by respondent's father.

**Proceedings Below**

After almost 200 copies of this book had been distributed to local bookstores, respondent sued for a pre-

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[3] *Amici* have decided not to reproduce examples of this material because it is possible that readers of this brief who know respondent may be able to identify her by the characteristics discussed at p. 30, *infra*. Nevertheless, to understand the intimate and embarrassing nature of these disclosures, one must read the book. See, *e.g.*, *In Search of a Response*, Helena section at 5, 6, 9, 11, 30, 33, 35, 59, 65, 76, 79, 82, 83 97 100-102, 155, 165, 168-72, 191, 227, 229, 249, 262, 275, 282, 290, 314, 319, 327, 331.

[4] Petitioners also claim that further disguise is effected because the locale is not mentioned. (Pet. Br. at 4 n.2.) On the contrary, the book's introduction reveals that at least some treatment occurred at petitioners' "place" in Katonah, New York, which is portrayed as a weekend or summer home. See *In Search of a Response* at viii-ix.

liminary injunction pending resolution of the suit, for damages resulting from the copies already disseminated, and for a permanent injunction against further distribution.[5] On the basis of affidavits filed by petitioners and respondent, as well as supporting affidavits and papers, and after oral argument by counsel, the trial court issued a preliminary injunction against distribution through channels "not reasonably calculated to be addressed to scientific readers." Distribution was permitted through universities, medical schools, text book stores, scientific book stores, and the like. (App. at 82-85.)

The trial court reasoned that when

> "[c]onfidential information is learned, in confidence, under a contract that it shall not be disclosed, I think an injunction will lie to restrain the unauthorized disclosure. . . .
>
> Here the defendants obtained information from plaintiff, under the implied, if not express, agreement that confidence would be respected . . . ." (App. at 83.)

The court went on to note the "countervailing" public interest in publication of medical case histories, and therefore concluded that only a limited preliminary injunction should be granted.

The trial court also discussed whether respondent could be identified in the book and whether she consented to publication, without indicating the relevance of these factors to respondent's cause of action. The court seems to have ruled that respondent's identity was adequately disguised. (App. at 83-84.) It also held that, as a

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[5] Petitioners point out that "significantly" respondent's ex-husband's new wife did not join in the action. (Pet. Br. at 3-4 n. 1.) None of this woman's confidences, however, have been published. Nor does the book disclose a great deal about her private life.

matter of law, only written consent, which petitioners did not allege, would suffice. (App. at 84-85.)

Defendants appealed the limited preliminary injunction to the Appellate Division of the state Supreme Court; plaintiff then cross-appealed. The unanimous panel modified the original injunction and prohibited all distribution of the book until further "order of the Court or until final judgment is rendered herein." (App. at 105.) The court also stated that "[a] preference shall be granted for an early trial upon application of either party." (App. at 105.)

The Appellate Division's opinion made no specific reference to the trial court's ruling based on contract, but rested instead on "the confidentiality accorded the physician-patient relationship" as well as "the expanding recognition of invasion of privacy actions." (App. at 104.) Similarly, the Appellate Division did not refer to the trial court's findings on disguise and consent, nor did it discuss the relationship between these factors and plaintiff's cause of action. Instead, the court simply stated that these justifications were not sufficient to defeat the preliminary injunction. See pp. 28-30, *infra*.

Defendants appealed the preliminary injunction to the New York Court of Appeals, which unanimously affirmed without opinion. This Court then granted *certiorari* to decide whether the preliminary injunction at issue violates the First Amendment as applied to the states through the Fourteenth Amendment.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves two important values that are in apparent conflict. On the one hand, there is the doctor's interest in publication purportedly protected by the First Amendment as embodied in the prior restraint doctrine. On the other hand, there are the patient's in-

terests in confidentiality, which is essential for effective mental health treatment, and in privacy, which is essential for a happy and productive life. The conflict between these interests is raised in this case because a doctor wants to communicate her ideas by means of a publication that reproduces a patient's treatment and therefore exposes the patient's most personal and painful thoughts, feelings, and fantasies. In seeking to resolve this apparent conflict between important values the Court should proceed cautiously in order to avoid jeopardizing any of the values unnecessarily. To do otherwise might result either (1) in eroding the important doctrine prohibiting prior restraints and, in effect, allowing for curtailment of speech that differs from the type presented in the instant case, or (2) in undermining, more than is absolutely essential, the individual's right to privacy and the confidentiality required for encouraging people to secure needed treatment.

Because careful and fully informed resolution of this basic conflict is critical, *amici* believe that the present case is unsuitable for review by this Court at this time. On a motion for preliminary injunction, with little opportunity for fact-finding and full argumentation, the state courts were presented with novel and complex questions of state as well as constitutional law. Moreover, these difficult legal issues were presented in a murky factual context—fundamental issues, such as whether respondent could be identified in the case study and whether she had consented to its publication, were vigorously disputed. Thus, the state courts were required in expedited fashion to make a preliminary determination as to whether dissemination should be curtailed only for the period of time required for a final resolution of the case on the merits. Not surprisingly, therefore, the opinions by the lower state courts are cryptic and somewhat inconsistent, and the New York Court of Appeals issued no opinion whatsoever. Accord-

ingly, in order to avoid establishing a *national* rule in so sensitive an area on such an inadequate record, this Court should, as a matter of sound judicial policy, either dismiss the writ of *certiorari* as having been improvidently granted or deny jurisdiction on the ground that the preliminary injunction entered below is not a final judgment within the meaning of 28 U.S.C. § 1257. If either course is taken a speedy trial on the merits will follow. And, *if* a permanent injunction is subsequently granted, this Court can review the case on the basis of a record presenting fully developed facts and clearly explicated law.

In urging this disposition, which would of course let stand the preliminary injunction entered by the courts below, *amici* are aware that any injunction against publication of a book—even an injunction *pendente lite*—raises important constitutional issues. Nonetheless, on the face of the present record it is clear that the countervailing interests in privacy and confidentiality are also great. These interests are such that if preliminary relief is not afforded, the harm to respondent will be truly irreparable. And, since the speech in question does not relate directly to political or governmental matters, the short delay in publication required for the state courts to resolve fully the issues raised will not deny the citizenry information which, because it is essential to democratic decisionmaking, is at the core of the First Amendment's protection. Indeed, there is nothing "timely" about the present book; the authors themselves have already delayed publication for more than ten years.

If, despite these considerations, this Court decides to consider the merits at this time, *amici* submit that the preliminary injunction should be affirmed. The most reasonable reading of the record below is that respondent is identifiable, and that she did not consent to publication. In these circumstances the harm from disclosure—both to the individual patient and to future

patients who will be deterred from seeking effective treatment—outweighs the narrow intrusion, if any, on First Amendment interests. As a general proposition, *amici* suggest that when *private* parties share *private* information on condition that such information not be made public, and where exchange of such information is essential to an activity supported by sound public policy, the First Amendment should not protect publications in violation of the confidentiality agreement.

Furthermore, despite the strong antipathy to prior restraints, *amici* believe that no constitutional purpose would be served by prohibiting injunctive relief and by permitting instead a damage remedy for violation of the confidentiality agreement. Here, unlike many other "prior restraint" cases that have come before the Court, this book has already been published and, therefore, the injunction is limited to identifiable material, and does not apply to speech that has not as yet occurred. Thus, the preliminary injunction differs from a damage remedy only in that the preliminary injunction was entered before a full hearing on the merits. But, unlike other prior restraints invalidated by this Court on the grounds of procedural inadequacy, the present injunction was issued only after an adversary proceeding before a state court. On the basis of this procedure, and in view of the fact that if a preliminary restraint had not been imposed subsequent relief would have been meaningless since money could never compensate respondent for the devastating assault on her privacy and dignity, the injunction *pendente lite* should be affirmed.

## ARGUMENT

### I. THE WRIT OF *CERTIORARI* SHOULD BE DISMISSED

#### A. This Court Lacks Jurisdiction.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(3) which applies to "*final judgments or decrees* rendered by the highest court of a state in which a decision could be had. . . ." (Emphasis supplied.) The general rule, announced long ago, for determining finality is:

> "[A] decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis I.M.&S. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28 (1883).[6]

The purposes underlying the finality requirement were recently noted by this Court:

> "(1) it avoids piecemeal review by federal courts of state court decisions;
>
> (2) it avoids giving advisory opinions in cases where there may be no real 'case' on 'controversy' in the sense of Art. III;
>
> (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 159 (1973).[7]

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[6] See also *Gospel Army* v. *City of Los Angeles*, 331 U.S. 534 (1947); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964).

[7] See also *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 123-24 (1945); *Catlin Trustees* v. *United States*, 324 U.S. 229 (1945). See generally Crick, "The Final Judgment as a Basis for Appeal," 41 Yale L. J. 539 (1932); Boskey, "Finality of State Judgments Under the Federal Judicial Code," 43 Colum. L. Rev. 1002 (1943).

To effectuate the last two of these policies when reviewing temporary or preliminary injunctions curtailing speech, the Court—while according due regard to the fact that the matter enjoined is speech—has held that a judgment is final when it appears "that the issuance of a permanent injunction upon termination of these . . . proceedings will be little more than a formality." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 n. 1 (1971); see *Local 438 Construction and General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542 (1963).[8] In such circumstances, delay of this Court's review fosters comity since the decision on the permanent injunction may not present a constitutional issue. Delay also enables this Court to avoid rendering an advisory opinion since the issues presented by a permanent injunction may be different from those presented by the preliminary injunction.

In deciding when a permanent injunction is "mere formality," the Court usually inquires: (1) whether the state courts "applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case," *Organization for a Better Austin* v. *Keefe*, *supra*, 402 U.S. at 418 n. 1; (2) whether "there is any indication that the injunction rests

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[8] In *Curry*, the Court relied primarily on the fact that the state courts were without jurisdiction even to decide whether an injunction should issue since jurisdiction was preempted under the National Labor Relations Act. Hence the state court's finding of jurisdiction could be viewed as final. Here, it is clear that the state courts had jurisdiction to entertain the petition for a preliminary injunction.

This Court also reviewed a temporary injunction in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). In that case, however, since the temporary injunction remained "in effect until further modification by the court and since there is no indication that any modification . . . will be forthcoming," the judgment was treated as final. *Id.* at 312 n. 5. Here, on the other hand, the preliminary injunction remains in effect only for the duration of the litigation.

on a disputed question of fact that might be resolved differently upon further hearing," *id.*; and (3) whether "petitioners . . . have [any] defense to offer other than their [constitutional] contentions," *id.* at 421 (Harlan, J., dissenting). Application of each of these tests to the present case demonstrates that the issuance of a permanent injunction will be significantly more than a "formality."

First, it appears likely that "a more rigorous" standard will be applied before a permanent injunction is granted and sustained. The Appellate Division—the highest state court to issue an opinion—explicitly stated that respondent had "made a sufficient showing to warrant the granting of the *provisional remedy* requested." [App. at 105 (emphasis supplied).] And, of course, the state's high court affirmed without opinion. In light of the novelty and complexity of the issues, it would seem that the state appellate courts—proceeding on a necessarily skimpy record—simply manifested the traditional deference given to a trial court's issuance of a preliminary injunction *pendente lite*.[9] Surely such deference would not be accorded a permanent injunction against publication of a book. See also p. 27, *infra*.

Second, as petitioners themselves assert, "there are hotly contested factual issues" still largely unresolved.

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[9] See *Maas* v. *United States*, 371 F.2d 348 (D.C. Cir. 1966), which also involved a preliminary injunction against a book. The Court of Appeals affirmed the injunction on the ground that:

> "It must be borne in mind here that this is not an appeal from a final judgment after a trial or from a summary judgment finally disposing of the case. It is here on the District Court's grant of a prohibitory preliminary injunction aimed at preserving the *status quo*. Appellate courts quite generally view the grant or denial of a preliminary injunction as resting in the sound discretion of the trial court and limit determination on appeal to whether there has been 'abuse of trial court discretion,' 'clear error,' 'violation of the rules of equity,' or 'improvident granting.'" *Id.* at 351.

(Pet. Br. at 21.) Most particularly, the issues of whether respondent is identifiable and whether she consented to publication are in dispute. Indeed, the trial court appears to have found, on the basis of the affidavits, that disguise was adequate. Although the intermediate appellate court, when imposing a preliminary injunction, reversed this determination, it is not at all clear that such a finding would be reversed if supported by a full factual record with testimony on the issue of identifiability and expert evidence on the question of whether this book meets professional standards for disguise. Similarly, petitioners vigorously claim that respondent consented to publication. (App. at 30-34.) This issue, too, might be resolved differently after a full factual hearing.[10] And, while the opinions below are not explicit regarding the relationship between respondent's cause of action and the issues of disguise and consent, it seems obvious that if respondent is found to have consented to publication she will not prevail on the permanent injunction. Similarly, it is at least questionable whether she could prevail if the courts found that she could not be identified.

Finally, petitioners have also raised a non-constitutional equitable defense. They contend that respondent knew about the planned publication for several months, but nonetheless delayed instituting legal action to petitioners' detriment, and is therefore guilty of laches. (App. at 41-43.) The opinions granting the preliminary injunction did not address this issue; there is no indication, however, that it will not be fully explored before a permanent injunction issues. If successful, the defense of laches would remove the constitutional issues raised by an injunction.

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[10] The trial court found as a matter of law that consent had to be written; that legal conclusion, however, was not discussed on appeal. Thus, it is not clear that the lower court's ruling will eventually be affirmed.

There is yet another purpose underlying the finality requirement—avoidance of piecemeal review, see page 13, *supra*—that would be furthered by a finding of no jurisdiction at this time. The courts below have not even addressed the question of damages for publication in violation of the confidentiality agreement. That question is also likely to raise First Amendment issues since, if damages are granted, the state will be imposing a penalty for what petitioners claim is the exercise of their constitutionally protected right of speech. See Pet. Br. at 28-36; *cf. Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (damage remedy for tortious invasion of privacy raises constitutional issues). However, even if a damage remedy should raise issues of constitutional dimension, these issues are not identical to the First Amendment issues presented by the instant injunction since the prior restraint doctrine is inapplicable to a damage remedy. Thus, review of the injunction at this time might not resolve all of the constitutional issues raised in this case and the Court might be required to consider the case twice, even though the issues would arise out of the same facts and, to some degree, present similar constitutional questions. Such a result clearly undermines the policy of discouraging piecemeal review.

In sum, each of the three rationales supporting the finality requirement would be frustrated by review at this time. Moreover, in this case, in contrast to *Organization for a Better Austin* v. *Keefe*, *supra*, there are no strong countervailing reasons for overriding the purposes of § 1257's finality requirement since the present injunction has not had the same kind of "marked impact on petitioners' First Amendment rights." *Id.* at 418 n. 1; *cf. Rosenblatt* v. *American Cyanamid Co.*, 86 S.Ct. 1 (1965) (Goldberg, J., in chambers). In *Keefe*, the petitioners were involved in a dispute regarding real estate practices, and they were enjoined from distributing "literature of any kind" and "from picketing." 402 U.S.

at 417. Due to the timeliness of the issue and the breadth of the injunction in *Keefe*, the temporary injunction had a significant effect on First Amendment rights. Here, however, the injunction is limited to a single book which the authors themselves have kept from publication for more than ten years. Since the subject matter is not governmental or political, see pp. 39-42, *infra*, and since it does not bear on an issue requiring an immediate public decision, First Amendment interests would not suffer significantly if publication were delayed solely for the time needed to reach a final resolution of the merits of this case.[11]

**B. The Writ Was Improvidently Granted.**

Even if the Court should find that it has jurisdiction to decide this case, it should nonetheless exercise its discretion to dismiss the writ of *certiorari* as having been improvidently granted. The same kind of concerns that dictate a finding of no finality also strongly suggest that the writ should be dismissed.[12]

While no fixed rules govern when this Court will dismiss a writ as having been improvidently granted, typical instances include cases where the record is not "suffi-

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[11] It is also relevant to note that the injunction here—unlike the injunction in *Keefe* which had been in effect for three years—has been in effect for just over one year. That time has been consumed exclusively by petitioners' two appeals in the state courts and their effort to secure *certiorari* in this Court. Instead of seeking these appeals petitioners could have accepted the limited injunction, which allowed publication in the scientific community, and pressed for a speedy resolution of the issue of a permanent injunction. While petitioners clearly had a right to these appeals, they should not also be allowed to complain about the length of time for which the preliminary injunction has been in effect.

[12] In several cases the writ has been dismissed as improvidently granted on the ground that "no final judgment has been entered." *Fox Film Corp.* v. *Muller*, 294 U.S. 696 (1935). See *Whitus* v. *Georgia*, 385 U.S. 545 (1967).

ciently clear and specific to permit decision of the important constitutional questions involved. . . ." *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968)[13] or when the issues are not "presented with sufficient clarity. . . ." *Kimbrough* v. *United States*, 364 U.S. 661 (1961), or when there are "[a]mbiguities in the record as to the issues sought to be tendered," *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U.S. 231 (1960).

At the outset it is important to reiterate the significance of the main issue presented for review—the resolution of a possible conflict between the important policy of encouraging citizens to seek mental health care by insuring confidentiality, and the right to publish a book of alleged scientific worth. To decide this issue the Court should obviously seek a record that is clear on the law and the facts; instead it now has a record that is inadequate and confused.

First, the record below does not make clear which New York law justifies the present injunction. There are no fewer than *five* possible theories implicit in the holdings of the state courts. Each theory, when weighed against the interests protected by the First Amendment, presents *different* issues of constitutional dimension.

The trial court appears to have rested its ruling on a theory of common law contract between private parties: "[T]he defendants obtained the information from plaintiff, under the implied, if not express, agreement that confidence would be respected. . . ." (App. at 83.) The intermediate appellate court—the highest state court to issue an opinion in this case—did not explicitly discuss the common law contract theory advanced by the trial court. Instead, it ruled:

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[13] See also *Johnson* v. *Massachusetts*, 390 U.S. 511 (1968); *Smith* v. *Mississippi*, 373 U.S. 238 (1963); *Wainwright* v. *City of New Orleans*, 392 U.S. 598 (1968) (Fortas, J., concurring).

"Defendants also assert that no cause of action for a breach of confidentiality exists on the facts pleaded and that plaintiff cannot obtain relief under Civil Rights Law §§ 50 and 51, since those sections are inapplicable to a truthful, educative, nonfiction book on the subject of mental illness. Defendants' manner of advertising and selling the book, however, would seemingly contradict their avowed purpose of solely advancing scientific knowledge. In light of the expanding recognition of invasion of privacy actions (*cf. Griswold* v. *Connecticut*, 381 U.S. 479; *Roe* v. *Wade*, [410 U.S. 113]; *Nader* v. *General Motors Corp.*, 25 NY2d 560), and in view of the confidentiality accorded the physician-patient relationship, we believe that plaintiff has alleged a cognizable claim for relief and has made a sufficient showing to warrant the granting of the provisional remedy requested."

This holding begins by relying on the state privacy statute [14] as the source of respondent's protection, and

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[14] The New York privacy statute, N.Y. Civil Rights Law §§ 50, 51, provides:

"§ 50. *Right of privacy.*

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. *Action for injunction and for damages.*

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages."

suggests that the way in which the book has been advertised places it within the statute's proscription.[15] The privacy statute explicitly provides for injunctive relief.[16]

The appellate court goes not to speak of the "expanding recognition of privacy actions" and cites to three cases. The first two cases are decisions of this Court announcing a *constitutional* right to privacy. Thus, the appellate court could be suggesting that the state's failure to protect respondent's privacy in these circumstances would constitute a deprivation of a constitutional right.[17]

The third case cited by the appellate court—*Nader* v. *General Motors Corp.*—is a decision of the New York Court of Appeals applying the District of Columbia's common law of torts which protects personal privacy. New York is one of the few jurisdictions that has not established tort protection for privacy infringements.[18] However, there have been strong suggestions that if faced with the question today, New York, like most states, might well find a privacy cause of action ground-

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[15] Breaches of doctor-patient confidentiality have previously been found actionable under this statute. See *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920); *Griffin* v. *Medical Society of New York*, 7 Misc.2d 549, 11 N.Y.S.2d 109 (1939).

[16] See note 14, *supra*.

[17] See *Gallela* v. *Onassis*, 353 F. Supp. 196, 232 (S.D. N.Y. 1972), where, in an analogous situation involving an invasion of privacy, the court held that "[t]he act of a court—even the entry of a judgment denying relief—is state action within the meaning of the Fourteenth Amendment. . . . Hence, the denial of relief in this case—relief essential to vindicate a basic human and constitutional right—would itself violate the Constitution." The Second Circuit did not address this issue on appeal. *Gallela* v. *Onassis*, 487 F.2d 986 (2nd Cir. 1973). See also *Nader* v. *General Motors Corp.*, 31 App. Div.2d 392, 298 N.Y.S.2d 137 (1969), aff'd 25 N.Y.2d 560, 255 N.E.2d 765 (1970).

[18] See *Roberson* v. *Rochester Folding-Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

ed in tort law.[19] Thus, the court's citation to *Nader* may indicate the possibility that in this case, when considering the issues of a permanent injunction or damages, New York might reconsider its 1902 decision barring tort recovery for privacy invasions.

Finally, the appellate division concluded its holding by relying on "the confidentiality accorded the physician-patient relationship." Thus, the court could be resting on the common law contract theory of confidentiality relied upon by the trial court (the appellate court styled respondent's claim as one for "*breach* of confidentiality"). The court could also be suggesting that the injunction was issued pursuant to the state's statutory medical licensing provisions which regard disclosure of confidences as "unprofessional conduct" justifying license suspension or revocation.[20] Under New York law a private cause of action is frequently implied from a prohibitory statute

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[19] See *Gallela* v. *Onassis*, *supra* 487 F.2d at 995 n. 12 ("Although the New York courts have not yet recognized a common law right of privacy, if we were required to reach the question, we would be inclined to agree with the court below that when again faced with the issue the Court of Appeals may well modify or distinguish its 1902 holding in Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), that 'The so-called right of privacy has not as yet found an abiding place in our jurisprudence.' There is substantive support today for the proposition that privacy is a 'basic right' entitled to legal protection, Time v. Hill, 385 U.S. 374, 415, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (Fortas, J., dissenting), nor can the 'power of a State to control and remedy such intrusion [even] for news gathering purposes . . . be denied.' *Id.* at 404, 87 S.Ct. at 550 (Harlan, J., concurring and dissenting). Privacy essential to individual dignity and personal liberty underlies the fundamental rights guaranteed in the Bill of Rights."). See also *Gallela* v. *Onassis*, *supra*, 353 F. Supp. at 227-31.

[20] See New York Education Law §§ 6509-6511 and regulations issued pursuant thereto, N.Y. Code of Rules and Regulations, Vol. 8, § 60.1. See also N.Y. Civ. Prac. Law and Rules § 4504(a) providing a testimonial privilege for communications between a doctor and patient.

such as this one.[21] Moreover, there are dicta in several lower court New York cases supporting a private cause of action based on the licensing statute.[22] Other courts have also followed this approach.[23]

Faced with these five potential justifications—common law contract, state licensing statute, common law tort privacy, state privacy statute, and constitutional privacy right—in support of the holdings of its lower courts, the New York Court of Appeals simply affirmed the injunction without opinion. Hence this Court, if it does not dismiss the writ, will not have clear guidance as to which of these statutory, common law, or constitutional provisions did in fact justify the present injunction. Moreover, the competing interests, and, correlatively, the nature of the constitutional issues raised by these different theories are largely distinct:

1. Contract theory.—If the injunction is viewed as a means in aid of specific performance of a private-party, doctor-patient contract not to disclose confidences, then the threshold question is whether state enforcement of such a contract provides sufficient "state action" to trigger a constitutional issue. Compare *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Even assuming there is sufficient state action, it is not at all clear that the same First Amendment standards—including the prior restraint doctrine—are applicable. When two *private* parties agree to share *private* information, and confiden-

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[21] See *Gallela* v. *Onassis*, *supra*, 353 F. Supp. at 227, and cases cited therein.

[22] See *Clark* v. *Geraci*, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (1960). Cf. *Felis* v. *Greenberg*, 51 Misc. 2d 881, 273 N.Y.2d 288 (1966). See generally, Annotation, Physician's Tort Liability, Apart From Defamation, for Unauthorized Disclosure of Confidential Information About Patient, 20 A.L.R.3d 1109 (1968).

[23] See, *e.g.*, *Simonsen* v. *Swenson*, 104 Neb. 224, 177 N.W. 831 (1920); *Abelson's, Inc.* v. *New Jersey State Board of Optometrists*, 5 N.J. 412, 75 A.2d 867 (1950).

tiality is a condition of the exchange, the First Amendment considerations are distinctly different from when the *state* itself seeks to suppress information. See Section II B, *infra*.

2. Private remedy based on licensing statute.—This approach would raise somewhat different constitutional issues since the obligation on the doctor would be imposed by the state rather than by an agreement between private parties. Nevertheless, the intrusion on First Amendment interests would still be relatively slight since the speech that would be curtailed would turn on the fact of a confidential relationship, rather than on the content of the speech involved. In effect, curtailment of this book could be viewed as a small part of a broad state effort—including licensing provisions and a testimonial privilege—to enforce a legitimate concern for confidentiality in the doctor-patient relationship. Thus, this case would be similar to other cases involving implementation of government policies that have the occasional effect of curtailing speech. Compare *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969) (labor relations statute); *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418 (1911) (labor statute); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (equal employment opportunity provisions).

3. Statutory or tort privacy protection.—Both of these approaches protect, to a large degree, the *content* of the disclosure as distinguished from the *nature* of the confidential relationship. Either approach would raise substantial First Amendment questions that have only been briefly touched upon by this Court. In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), the closest case on point, a magazine had published an article about the opening of a play based on a true event that involved plaintiff and his family, who were mentioned by name in the article. Some of the statements in the article were fic-

tionalized. Plaintiff sued for damages under the New York privacy statute. The Court ruled that plaintiff could recover only if the fictionalizations were made "with knowledge of [their] falsity" or in "reckless disregard of the truth." *Id.* at 388. Thus, implicitly, the Court held that no recovery could be had for truthful revelations of the kind in issue. However, the Court went on to note that under the New York statute, damages might be allowed where:

> " 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.' Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (C.A.2d Cir.), cert. denied, 311 U.S. 711 (1940). . . . *This case presents no question whether truthful publication of such matter could be constitutionally proscribed.*" *Id.* at 383 n. 7. (Emphasis supplied.)

Hence, if respondent's remedy is grounded purely in statutory or tort privacy protection this case would present significant constitutional questions affecting a major body of privacy law.[24]

4. Constitutional privacy.—If respondent's relief was based on a constitutional claim of privacy, this case would require resolution of two competing constitutional interests. Initially, of course, it would raise the issue of

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[24] This Court has agreed to hear another case this Term that raises some of these same issues. *Cox Broadcasting Corp.* v. *Cohn*, 415 U.S. 912 (1974) (constitutionality of state statute prohibiting disclosure of names of rape victims). See generally, Nimmer, "The Right To Speak From *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy," 56 Calif. L. Rev. 935 (1968); Franklin, "A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact," 16 Stan. L. Rev. 107 (1964); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?" 31 Law & Contemp. Prob. 326 (1966); Bloustein, "Privacy, Tort Law and the Constitution—Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?" 46 Tex. L. Rev. 611 (1968).

state action either in the sense, discussed above, see note 17, *supra*, of a court failing to enter a judgment protecting a basic right, or in terms of whether the state's licensing of doctors constitutes sufficient governmental involvement. Compare *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (no state action in liquor licensing). And, if the state action hurdle were surmounted, the question would then be whether this sort of privacy is within the constitutional spectrum.[25]

Not only are the opinions below unclear as to the source of respondent's legal protection, but they also fail to make explicit the relationship between respondent's cause of action and the issues of consent and disguise. The constitutional issues presented might be different depending on the state law regarding disguise and consent. (For example, the harm from publication is obviously different when the subject is not identifiable.) And, moreover, the courts below seem to hold somewhat inconsistent views on the issues of disguise and consent. The trial court, while *granting* a limited injunction, appears to have found that the effort to disguise respondent's identity was adequate. See note 27, *infra*. The Appellate Division, however, without even acknowledging the trial court's finding or discussing the issue, simply held that the disguise was inadequate. Similarly, the findings on consent are not sufficiently clear. The trial court held that written consent was required; the Appellate Division stated only that consent was insufficient in this case.

A review of the factors relevant to the questions of jurisdiction and discretion to dismiss the writ, make clear that there should not be review by this Court at

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[25] See *Doe* v. *Bolton*, 410 U.S. 179, 194 (1973). See also *Roe* v. *Ingraham*, 480 F.2d 102 (2d Cir. 1973) (Friendly, J.) ("Should the constitutionally protected zone of privacy be extended beyond the area already recognized, the individual's interest in keeping to himself the existence of his physical ailments and his doctor's prescription for them would lie rather close in the continuum.").

this time. The courts below were faced with a case raising novel legal issues and presenting difficult factual disputes. Full resolution of such a case would obviously have required at least several months. Thus, the courts below were obliged to make an *expedited* preliminary determination solely on the basis of the book and the affidavits by the parties. As a result, that determination was accompanied only by abbreviated opinions, which themselves serve to illustrate the preliminary nature of the injunction. Indeed, the irony in petitioners' argument before this Court is that it relies chiefly on the claim that the record below is inadequate to support a prior restraint. (Pet. Br. at 20-28). But it is precisely that inadequacy which demonstrates that the instant injunction was necessarily preliminary in effect as well as in name, and that this Court consequently lacks jurisdiction to review it.

## II. AN INJUNCTION BASED ON A PRIVATE CAUSE OF ACTION FOR BREACH OF THE CONFIDENTIALITY OWED BY PSYCHOTHERAPIST TO PATIENT IS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT.

If, notwithstanding the arguments advanced in Part I of this brief, the Court finds it necessary to reach the merits of the preliminary injunction, it is *amici's* position that, on the record as it now stands, the injunction should be affirmed. *Amici* believe that a case study such as the instant one, consisting of an extensive presentation of the treatment of an identifiable person, and published without adequate consent, offends professional ethics, public policy, the agreement of confidentiality, and the patient's right to privacy. Furthermore, an injunction prohibiting distribution of such a book is not barred by the First Amendment.

### A. Respondent Did Not Consent to Publication and She Is Identifiable.

Petitioners claim that "insofar as [the issues of consent and identifiability] have been resolved at all, they have been largely resolved in favor of petitioners." (Pet. Br. at 21.) On the contrary, we submit that the only fair reading of the record is that there was no consent and that respondent is identifiable.

#### 1. *Respondent Did Not Consent to Publication.*

Both the trial court and the Appellate Division explicitly found that consent was legally insufficient and the Court of Appeals affirmed the decision of the Appellate Division. Hence, the state courts uniformly resolved this issue in respondent's favor.[26]

#### 2. *Respondent Is Identifiable.*

On the question of whether respondent can be identified by people reading the book, petitioners refer only to the ruling of the trial court (Pet. Br. at 5 n. 3);[27] they

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[26] Petitioners rest their claim of consent largely on an allegation, denied by respondent, that while in treatment respondent consented to publication. (Affidavit of Roe and Poe, App. at 30-34.) *Amici* note that there are significant problems in insuring that consent received during the course of treatment is voluntary, since at that time, the patient is unusually dependent on the doctor, and may feel unable to resist the doctor's wishes. See generally, Office of Science and Technology, *Privacy and Behavioral Research* 18-23 (1967). On rare occasion, the inherently coercive nature of the treatment relationship may be sufficiently neutralized so that consent may be validly obtained during treatment. But there is no evidence in this case that the consent allegedly given during therapy took place under such neutralized circumstances; on the contrary, there are indications that it was not so received. See, *e.g.*, *In Search of a Response*, Henry section at 438 ("Who do you think you are, writing a book? . . . My life has been wrecked by you, you lousy stinking analyst. The treachery of it to make such a book. . . . You are a mad scientist.").

[27] The trial court stated that the steps taken to disguise respondent's identity "reasonably meet the usual standards for such

fail to mention the holding of the appellate court to the opposite effect:

> "The claimed justification for publication, resting on the alleged consent of plaintiff and *the attempt to disguise her identity* does not provide a sufficient valid basis for denying the [preliminary injunction]." [App. at 104 (emphasis supplied).]

Although this ruling is less specific than might be desired, *amici* submit that the only reasonable reading of this key sentence is that the Appellate Division reviewed the record, and reversed the trial court's ruling on identifiability. The question of whether disguise was adequate depended only on a reading of the book and the identifying characteristics as discussed in the parties' affidavits. Thus the appellate court was in the same position to make this determination as was the trial court. In essence, the issue of disguise is a legal question—how identifiable need respondent be?—that may be resolved by reviewing the book.[28] The New York Court of Appeals affirmed the decision of the Appellate Divi-

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disguising," and concluded that the book "would [not] identify plaintiff as the patient to someone who did not already know plaintiff was the patient." (App. at 83-84.) Nevertheless the court granted a limited injunction against distribution. One way to reconcile this apparent contradiction between the court's finding on identifiability and the court's decision to issue an injunction is to read the court's statement on identifiability to mean that respondent could not be identified unless someone already knew she was a patient of Dr. Roe's. (See Pet. Br. at 5 n. 3.) If this were true, respondent would still be identifiable to a large number of people since many people are likely to know that Dr. Roe was her psychiatrist. Hence, even the trial court's findings could suggest that disguise was insufficient.

[28] Indeed, it would be grossly unfair to respondent, even for a permanent injunction, to require that she introduce testimony of people claiming they were able to identify her from the book. Respondent is seeking to keep this book from friends and colleagues. That purpose would be frustrated if she is required to have such people read the book and testify as to whether they could identify her.

sion, *not* the trial court. This Court therefore should assume that respondent is identifiable.

This reading of the record is also supported by a review of the book at issue, which itself is a part of the record. The book reveals that respondent's son was an autistic child with an unusual talent for music; that respondent's husband had two sons from a former marriage, that he was Jewish, went to Harvard Law School, dropped out and became a writer, and, that later in life he completed law school, became an attorney, was divorced from respondent, and remarried a female attorney. The book also discloses respondent's age, the fact that she was Jewish, that her first husband died, that her father attempted suicide and that respondent herself was a practicing psychotherapist. Given all this information plus the name of respondent's doctor—Dr. Roe did not publish under a pseudonym—it seems clear that respondent would be readily identifiable to a number of people.[29] This is particularly true because respondent is also a therapist, and therapists often reveal their psychiatrists' names to their colleagues.

Thus, contrary to petitioners' assertion, this book does not satisfy "the usual professional standards for disguising the patient's identity—the standards that have been evolved over the years by the profession itself. . . ." (Pet. Br. at 30.) Professional standards, in *amici's* view, require that if a case study is ever to be published without consent there must be no reasonable likelihood that the subject can be identified.[30] Clearly the book at issue fails to meet such a standard.

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[29] See Affidavit of Gloria Bley Miller claiming that she read only a few pages in a bookstore and, although she did not know that respondent was a former patient of Dr. Roe's, she "immediately realized that the book was exclusively about [respondent], and her son, and her former husband." (App. at 65-66.)

[30] See generally, Slovenko, *Psychotherapy, Confidentiality, and Privileged Communication* 64 (1966) ("the public use of identifying characteristics of any individual [is prohibited]").

### B. A Publication in Violation of the Psychotherapist-Patient Agreement of Confidentiality Is Not Constitutionally Protected Speech.

*Amici* further submit that if this Court proceeds to the merits of this case the most reasonable reading of the opinions below—and the narrowest ground on which to rest the injunction—is that a patient has a right of action when a doctor violates his agreement to keep therapeutic communications confidential.[31] Such a right of action has been previously recognized in New York,[32] and has been accepted by almost every state that has considered the issue.[33] The basis for this action rests in

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[31] Petitioners' brief appears confused on the question of whether New York recognizes such a cause of action. At one point it states that the courts below "implicitly recognize that there is no common law cause of action in New York for breach of doctor-patient confidentiality. . . ." (Pet. Br. at 21 n. 19.) Later, however, petitioners concede: "It is apparent that the New York courts have found in this case . . . that a patient does have a cause of action for alleged breach of confidence by a doctor." (Pet. Br. at 29.)

In any event, the opinions below indicate that the New York courts rested their holdings, at least in part, on a recognition of a common-law action for breach of confidentiality. The trial court explicitly stated: "When confidential information is learned, in confidence, under a contract that it shall not be disclosed, I think an injunction will lie to restrain the unauthorized disclosure." (App. at 83.) The Appellate Division, while also referring to New York Civil Rights Law, § 50 and 51, and the right to privacy, specifically mentioned a "cause of action for a breach of confidentiality" as a legally sufficient basis for the relief granted. (App. at 104-105.)

[32] See, *e.g.*, *Felis* v. *Greenberg*, 51 Misc.2d 881, 273 N.Y.S.2d 288 (1966); *Clark* v. *Geraci*, 29 Misc.2d 791, 208 N.Y.S.2d 564, 567 (1960) ("The cause should . . . be recognized . . . because the duty of secrecy is implied by our statutory law and widely conceived in the doctor-patient relationship.").

[33] See, *e.g.*, *Hammonds* v. *Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (N.D. Ohio 1965); *Hague* v. *Williams*, 37 N.J. 328, 181 A.2d 345 (1962); *Berry* v. *Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958); *Simonsen* v. *Swenson*, 104 Neb. 224, 177 N.W. 831 (1920); *Smith* v. *Driscoll*, 94 Wash. 441, 162 Pac. 572 (1917). See generally, Annotation, 20 A.L.R. 3rd 1109 (1968); Note, Extrajudicial

the common understanding, shared by patient and doctor alike, that a doctor will not disclose confidential communications. All doctors since antiquity have sworn to uphold the Hippocratic Oath which provides:

> ". . . whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret. . . ." [Reproduced in Katz, *Experimentation with Human Beings* 311 (1972)].[34]

And, as the court in *Hammonds* v. *Aetna Casualty & Surety Co.*, 243 F. Supp. 793, 801 (N.D. Ohio 1965), aptly noted, "[a]lmost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence." [35]

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Truthful Disclosure of Medical Confidences: A Physician's Civil Liability, 44 Den. L. J. 463 (1967); Note, Action for Breach of Medical Secrecy Outside the Courtroom, 36 U. Cinn. L. Rev. 103 (1967); Note, 11 Villanova L. Rev. 662 (1966); Note, 79 Harv. L. Rev. 1723 (1966). But see *Quarles* v. *Sutherland*, 215 Tenn. 651, 389 S.W.2d 249 (1965). Even in *Quarles*, however, the court stated that there might be an action based on contract in cases where the patient compensates the physician. See *id.* at 215 Tenn. 657-58, 389 S.W.2d 252.

[34] See also Section 9 of the American Medical Association Principles of Medical Ethics:

> "A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community." Opinions and Reports of the Judicial Council (1969).

The caveat regarding "the welfare of the individual or the community" applies to matters such as reporting communicable diseases. See generally Note, "Medical Practice and the Right to Privacy," 43 Minn. L. Rev. 943 (1959).

[35] In terms of the constitutional issues presented for review, this Court need not concern itself with whether the cause of action is

Thus, although many courts, as in the opinions below, refer to the patient's "right of privacy" as the interest being protected in actions for breach of doctor-patient confidence, the cause of action is far more narrowly limited than the usual tort action for invasion of privacy. Unlike the real estate broker in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), or the subject of the magazine article in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), the patient claims no right to be free generally of adverse or embarrassing publicity; she claims only a right to have her physician respect the oath and agreement of confidentiality.

The rationale supporting this cause of action was eloquently expressed in *Hammonds* v. *Aetna Casualty & Surety Co.*, *supra*, 243 F. Supp. at 801-802:

> "When a patient seeks out a doctor and retains him, he must admit him to the most private part of the material domain of man. Nothing material is more important or more intimate to man than the health of his mind and body. Since the layman is unfamiliar with the road to recovery, he cannot sift the circumstances of his life and habits to determine what is information pertinent to his health. As a consequence, he must disclose all information in his consultations with his doctor—even that which is embarrassing, disgraceful or incriminating. To promote full disclosure, the medical profession extends the promise of secrecy referred to above. The candor which this promise elicits is necessary to the effective pursuit of health; there can be no reticence, no reservation, no reluctance when patients discuss their problems with their doctors. But the disclosure is certainly intended to be private. If a doctor

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styled a "contract" remedy or a "tort" remedy under state law. The important point is that the remedy is based on an *agreement*—be it express or implied—that the doctor will not disclose confidences learned in therapy. See Group for the Advancement of Psychiatry, Report No. 45 at 104 (1960).

> should reveal any of these confidences, he surely effects an invasion of the privacy of his patient. We are of the opinion that the preservation of the patient's privacy is no mere ethical duty upon the part of the doctor; there is a legal duty as well."

This legal duty furthers a very important public policy to encourage early and preventive medical intervention. Without an assurance of confidentiality patients will be less willing to seek medical assistance. This is particularly true in psychotherapy because it usually requires extensive disclosure of extremely private matters.[36]

In view of the legal protection offered doctor-patient communications, *amici* submit that the instant book should not be considered "speech" entitled to the protection of the First Amendment. When a *private* person shares *private* information with another person on condition that such information not be disclosed, and where the exchange of such information is essential to an activity supported by sound public policy, the Constitution should not protect violations of that agreement even though such violations take the form of a book.

We start from the position that only the most compelling reasons can justify the violation of an agreement that is essential to the functioning of an important public policy. Indeed, there should be important reasons given before *any* agreement may be disregarded with impunity. This is especially true when someone relies on the agreement and shares information which, but for the agreement, would not have been shared. In such circumstances the harm from disclosure is likely to be significant.

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[36] See *Taylor* v. *United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) ("Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he can not help him."). See also pp. 35-38, *infra*.

To understand the importance of these factors in the psychotherapist-patient context requires some understanding of how the therapeutic process functions.[37] People usually enter intense psychotherapy and especially psychoanalysis because they have deep-seated conflicts and impairment of functioning, usually accompanied by substantial pain and suffering, which limit their ability to work effectively or to have fully satisfying relationships with other people. To alleviate these conflicts, the therapist asks his patient to abandon "rational thought," to allow everything to enter his mind, and to verbalize it as soon as it appears. In this manner, the roots of the conflict—usually the unconscious infantile wishes that are repressed—begin to surface. And, according to Freud, "[i]f a [hysterical, phobic or obsessional idea] can be traced back to the elements in the patient's mental life from which it originated, it simultaneously crumbles away and the patient is freed from it." Freud, "The Interpretation of Dreams," in 4 *Standard Edition of the Complete Psychological Works of Sigmund Freud* 100-101 (1958). As a result of this process the patient is required to communicate:

> ". . . feelings and attitudes which are unacceptable to the patient and others[,] . . . attitudes considered asocial or anti-social by the community. The unconscious is a storehouse of a lifetime's sinful wishes (and every man in varying degrees is a combination of Dr. Jekyl and Mr. Hyde)." Slovenko, *Psychotherapy, Confidentiality and Privileged Communications* 47 (1966).

While disclosure of this material to a psychiatrist may be necessary for effective treatment, if it is revealed to

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[37] Not all therapeutic techniques are the same, nor do they all require the same kinds of disclosures. The techniques described in the text are those based on the therapeutic process developed by Freud. Such techniques were used in respondent's treatment.

one's friends or loved ones, it may destroy their love or trust: "In a world where men are not gods, . . . to know all is not to understand and forgive all." Freund, "Privacy: One Concept or Many," in Pennock & Chapman, eds., *Privacy* 196 (1971).[38] Indeed, psychiatrists are required to undergo painstaking training so that they can listen to such revelations without expressing shock or disapproval, or becoming disturbed themselves by such disconcerting material. It is hardly likely that one's friends and loved ones will react the same way to disclosure of a personality "completely at variance with the patient's everyday functioning personality." Slovenko, *supra* at 47.

Furthermore, dissemination of such massive amounts of extremely private information about a patient is likely to cripple his or her ability to function in society. To be effective and remain emotionally stable people must adopt different roles and postures in different circumstances.[39] Our ability to maintain these different roles depends, in turn, on our ability to control what others know about us.[40] In short:

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[38] See also Fried, "Privacy," 77 Yale L.J. 475, 485 (1968):

> "There are thoughts whose expression to a friend or lover would be a hostile act, though the entertaining of them is completely consistent with friendship or love. That is because these thoughts, prior to being expressed, are mere unratified possibilities for action. Only by expressing them do we adopt them, choose them as part of ourselves, and draw them into our relations with others."

[39] For an extensive discussion of the subtleties and nuances in these processes, see Goffman, *The Presentation of Self in Everyday Life* (1959); *Encounters* (1961); and *Behavior in Public Places* (1963).

[40] See Jourard, "Some Psychological Aspects of Privacy," 31 Law & Contemp. Prob. 307 (1966) ("The wish for privacy expresses a desire to be an enigma to others or, more generally, a desire to control others' perceptions and beliefs vis-a-vis the self-concealing person."). See also, Gross, "Privacy and Autonomy" in Pennock & Chapman, eds., *Privacy* 173 (1971).

> "Every person lives in several different worlds, and in each his mode of response may—indeed must—be different. The roles of father, husband, clerk, good neighbor, union leader, school board chairman, candidate for office, solicitor of funds for the local church, call for different responses. The right to privacy includes the freedom to live in each of these different roles without having his performance and aspirations in one context placed in another without permission." Office of Science and Technology, *Privacy and Behavioral Research* 8-9 (1967).[41]

Thus, failure to enforce confidentiality will have two highly unfortunate effects. First, it will deter patients from seeking therapy or from being sufficiently candid to allow for effective treatment. The nature of the material communicated to the doctor makes the risk of public disclosure too great for the patient to accept. Judge Luther Alverson has aptly noted:

> "It is extremely hard for [patients] to bring themselves to the point where they are willing to expose the dark recesses of their minds to the psychiatrists; often patients have undergone therapy for a year or more before they begin to reveal anything significant. . . . It would be too much to expect them to do so if they knew that all they say, and that all the psychiatrist learns from what they say,

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[41] Professor Fried also claims that this sort of disclosure will destroy a person's ability to develop the most basic human relationships. Both love and friendship, he argues,

> "involve the voluntary and spontaneous relinquishment of *something* between friend and friend, lover and lover. The title to information about oneself conferred by privacy provides the necessary something. To be friends or lovers persons must be intimate to some degree with each other. But intimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital we spend in friendship and love." Fried, "Privacy," 77 Yale L.J. 475, 484 (1968).

may be revealed to the whole world. . . ." [Speech before the Connecticut Mental Health Ass'n, June, 1968.)[42]

Second, disclosure will also have a devastating impact on the individual whose most intimate fantasies and thoughts are shared with the public, which will include loved ones, friends, and colleagues. Some of respondent's psychiatric communications—see the examples cited at note 3, *supra*—would have a catastrophic effect if, for example, they were disclosed to her son.

In view of the important interests protected by the agreement of confidentiality,[43] a violation of that agreement should be protected by the First Amendment only in the most compelling circumstances. Here, there is no such justification.

First, the speaker, of course, has waived his right to speak since he has agreed to maintain confidentiality. Thus, the First Amendment interest at stake is the public's right to *know*, and not the speaker's right to *publish*.

Next, it is important to note that the failure to enforce confidentiality agreements will eliminate the source from which the speech in question derives. For example, if patients cannot be assured absolute confidentiality, they will refuse treatment. Without treatment,

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[42] See also Group for the Advancement of Psychiatry, Report No. 45 at 92 ("There is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment"); Katz, "Levels of Confidentiality in the Psychoanalytic Situation," 20 J.A.M.A. 162-166 (1972); Ewalt & Farnsworth, *Textbook of Psychiatry* 299 (1963).

[43] In order to protect these interests, most states, despite the constitutional interest in a fair trial, have granted doctors a testimonial privilege exempting them from compelled testimony based on information learned in the course of treatment. *E.g.*, N. Y. Civ. Prac. Law & Rules § 4504(a); see generally Rule 504 of the *Proposed Rules of Federal Evidence* promulgated by this Court providing for a "psychotherapist-patient" privilege.

there will be fewer case histories from which to learn and, accordingly, less scientific information to share. Thus, by protecting speech the Court would, in part, be evaporating the source of the scientific information it sought to protect.

Finally, and perhaps most significantly, when private parties agree to share private information on condition that it not be divulged there is no compelling First Amendment interest in permitting disclosure. The decisions of this Court have made it absolutely clear that the primary purpose of the First Amendment was to eliminate "the Government's power to censor the press . . . *so that the press would remain free to censure the Government.*" *New York Times Co.* v. *United States*, 403 U.S. 713, 718 (1971) (opinion of Black, J.) (emphasis supplied). *See New York Times, Inc.* v. *Sullivan*, 376 U.S. 254, 276 (1964) (First Amendment prohibits restraint "upon criticism of government and public officials."). See generally Kalven, "The New York Times Case: A Note on The 'Central Meaning of the First Amendment,'" 1964 Sup. Ct. Rev. 191; Meiklejohn, "The First Amendment Is An Absolute," 1961 Sup. Ct. Rev. 245.

When private parties agree to limit publication of private information this paramount purpose of the First Amendment is not undermined. First, the state has no interest in regulating the *content* of the speech; it simply seeks to enforce the private agreement and to encourage the conditions necessary for promoting a desirable relationship. Second, when people limit private speech, the speech curtailed does not pertain to the government. Thus, like the scientific speech involved in the present case, such speech is clearly not "at the very center of the constitutionally protected area of free discussion," *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966); see *Mills* v. *Alabama*, 384 U.S. 214, 218. Third, the state

adjudicates only the rights of private parties. Justice White recently noted that the constitutional issues presented when a "private [party] enforc[es] a private right" by injunction are "distinct" from those arising out of "the Government's request for an injunction against publishing information about the affairs of Government." *New York Times Co.* v. *United States, supra*, 403 U.S. at 731 n. 1.[44] This past Term, for example, the Court adopted a less stringent constitutional standard for defamation of *private* parties than the one applicable to *governmental* figures. Compare *New York Times, Inc.* v. *Sullivan, supra*, with *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 94 Sup. Ct. 2997 (1974).

In sum, the First Amendment interests[45] at stake when private parties share private information on condition that it be kept confidential are insufficient to overcome the substantial interests protected by enforcement of the confidentiality agreement. Indeed, this past Term the

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[44] See also *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931):

> "Nor are we now concerned with questions as to the extent of authority to prevent publication in order to protect *private rights* according to the principles governing the jurisdiction of courts of equity." (Emphasis supplied.)

[45] Nor in assessing these First Amendment interests should the Court give credence to petitioners' wholly unsupported assertion that "if the decision below is permitted to stand, the impact upon medical writing will be direct, immediate, and severely deleterious." (Pet. Br. at 36). *Amici* believe that the enforcement of the confidentiality agreement will deter publication of only a small number of case studies. Non-psychiatric case histories will be largely unaffected since "the configuration of the body can [usually] be discussed without anyone recognizing the patient." Slovenko, *supra* at 64. Moreover, even psychiatric case histories are not likely to be significantly curtailed. Very few are book length expositions concerning a single person or family. Rather most studies reported in professional journals (see Pet. Br. at 30 n. 23) contain only a small fragment—a description of a dream or fantasy, for example—from the treatment of a particular individual. Thus, the likelihood of identification is usually negligible. Even when more extensive

Court gave implicit approval to these principles when it upheld an injunction against the disclosure or use of trade secrets by former employees of a corporation who had signed agreements not to disclose such secrets, without pausing to consider whether the injunction unconstitutionally abridged the employees' freedom of speech. *Kewanee Oil Co.* v. *Bicron Corp.*, —— U.S. ——, 94 S. Ct. 1879 (1974). See also *E. W. Bliss Co.* v. *United States*, 248 U.S. 37 (1918); *E. I. DuPont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100 (1917). Petitioners seek to distinguish the trade secret cases on the ground that "it is difficult to detect any First Amendment interest which is served by disclosure of the types of information customarily involved in trade secret cases." (Pet. Br. at 26.)[46] If by this statement petitioners mean that trade secrets have no social value as ideas, they are plainly mistaken. Indeed, this Court in *Kewanee Oil* referred to the type of ideas protected by trade secret law as having "an important part to play in the technological and scien-

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presentations are used, the patient, particularly if he thinks he is not likely to be identified, will sometimes consent to publication. See, *e.g.*, Laing & Estherson, *Sanity, Madness and the Family* viii (1964) ("Our greatest debt is to the persons, patients and family members, whom this book is about, who so generously consented to being studied, and to the results of our research being published."); Laing, *The Divided Self* 10 (1965) ("All of those whom I have referred at any length have given their willing consent to this publication. Names, places and all identifying details have been changed."). And when consent is not forthcoming, there is still the possibility that the scientific worth of the case can be presented in a different type of publication without identifying the patient.

[46] Petitioners also assert that trade secret cases are distinguishable because disclosure of secret technological or commercial information "would ordinarily be harmful without regard to whether the owner of the information is identified," while the patient in this case "can only be harmed if readers of the book can recognize her." (Pet. Br. at 26.) This distinction, which has no bearing in light of the facts of this case, also seems clearly irrelevant in terms of the First Amendment interests at stake in trade secret and in doctor-patient confidentiality cases.

tific advancement of the Nation." —— U.S. at ——, 94 S. Ct. at 1892. The reason why court enforcement of trade secret clauses in employee contracts does not run afoul of the First Amendment is that the restriction, unlike the restrictions in the law of libel or invasion of privacy, does not generally proscribe speech based on its content or its effect. Rather it simply defines the duty of one private party to another with respect to the disclosure of specific information, disclosed on condition that it remain confidential. The same rationale underlies those injunctions which have been issued by courts against the publication, even by the recipient, of private letters, *Peay* v. *Curtis Publishing Co.*, 78 F. Supp. 305, 309 (D.D.C. 1948); *Baker* v. *Libbie*, 210 Mass. 599, 97 N.E. 109 (1912).[47]

Accordingly *amici* submit that a proper regard for First Amendment freedoms does not require this Court, through mechanical invocation of the doctrine against "prior restraints" of expression, to impose special constitutional strictures upon the elements of plaintiff's cause of action—either by demanding a heavier burden of proof than that normally required to support equitable relief under state law, or by following petitioners' novel suggestion to create a new standard of care ("knowing or reckless disregard") in all actions for breach of doctor-patient confidentiality. Since the confidentiality agreement is between private parties seeking to curtail dissemination of private information, no constitutional interests require this Court to ignore the confidentiality agreement and the important purposes it serves, and to find the speech at issue protected under the First Amendment.[48]

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[47] See generally, Note, "Personal Letters: In Need of a Law of Their Own," 44 Iowa L. Rev. 705 (1959). Cf. *Estate of Hemingway* v. *Random House*, 23 N.Y.2d 341, 244 N.E.2d 250 (1968).

[48] Indeed the Fourth Circuit has recently enforced by way of an injunction limiting publication an agreement of confidentiality imposed by the government on employees of the CIA. *United States*

### C. No Valid Constitutional Purpose Would Be Served By Permitting a Damage Remedy But Prohibiting Injunctive Relief.

While *amici* believe that the speech at issue should be outside the First Amendment's protection, a possible accommodation between the competing claims presented in this case might lead the Court to permit a private damage remedy for violation of the confidentiality agreement while prohibiting an injunction on the basis of the "heavy presumption" against the validity of prior restraints. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). *Amici* submit that such an accommodation would serve no important constitutional purpose, and would undermine the confidentiality agreement and inflict great harm on respondent.

The principal objection to prior restraints is that they deter or suppress protected expression, as well as speech that may legitimately be proscribed: "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973). This effect may occur either because of the *form* of the restraint, or the *procedure* by which it is entered. In the former case, the restraint —usually in the form of an injunction against certain types of expression, see *Organization for a Better Austin* v. *Keefe, supra; Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931)—acts not against a particular existing

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v. *Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). While such a case is clearly distinguishable from the instant case in terms of the First Amendment considerations at stake, it is noteworthy that the Court *still* found the secrecy agreement to be valid and enforceable. See also *Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E.2d 610 (1969) cert. denied, 398 U.S. 960 (1970).

publication but against expression that has not yet occurred and thus cannot be tested in its context and setting and be judged with assurance to be unprotected. In the latter case, though the publication in question may already be in existence and subject to judicial determination as to whether it is protected or unprotected, the danger is that the procedure—whether it be a non-judicial licensing scheme, *Freedman* v. *Maryland*, 380 U.S. 51 (1965), or a preliminary judicial restraint based only on *ex parte* representations, see *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 195 (1968)—may result in the suppression for an extended time of speech which ultimately is found to be protected by the First Amendment.

When examined as to form, it is clear that the injunction in this case does not pose the dangers typical of prior restraints. The book in question is specifically identifiable and has, in fact, already been published and given a limited circulation. Thus, the present injunction is "couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate," *Carroll* v. *President and Commissioners of Princess Anne*, *supra*, 393 U.S. at 183; see *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, *supra*, 413 U.S. at 390. Indeed, in view of the fact that the instant book has been published "the operation and effect of the [injunction] in substance," *Near* v. *Minnesota*, *supra*, 283 U.S. at 713, is no different from a subsequent restraint. In each circumstance, distribution of the book may continue until some form of judicial relief is granted. Then, if an injunction is issued, continued distribution will result in summary contempt. If, on the other hand, a damage remedy is granted, continued distribution will result in the imposition of additional damages since the legal issue between the parties will have been previously resolved. Similarly, if the subsequent restraint had been a criminal sanction, further

distribution would result in additional penalties.[49] See *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957); Freund, "The Supreme Court and Civil Liberties," 4 Vand. L. Rev. 533, 537-39 (1951).[50]

Thus, because the book has been published, the injunction in this case is totally dissimilar to the injunction in *Organization for a Better Austin* v. *Keefe*, *supra*, which enjoined the organization "from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the City of Westchester, Illinois," on the ground that previous publications by the organization had invaded the privacy of a real estate broker. 402 U.S. at 417. It likewise has little common with the injunction in *Near* v. *Minnesota*, *supra*, which, on the basis of previously published material judged by the

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[49] Another distinction, applicable only to a subsequent criminal penalty, is that an injunction may be issued by the court alone, while under *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), a criminal conviction can only be rendered by a jury. *Cf. Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 447 (1957) (Brennan, J., dissenting). To the extent that this distinction is of constitutional relevance, it is important to note that the constitution does not require a jury trial in a state damage action, such as the one that would be involved in the present case.

[50] The only other decision of this Court known to *amici* that concerned an injunction against identifiable material, and that did not involve the adequacy of the procedures used, is *New York Times Co.* v. *United States*, *supra*. In that case—which spawned nine different opinions—three members of the six-man majority relied primarily on the fact that Congress had "not authorized the injunctive remedy," 403 U.S. at 740 (opinion of White, J., joined by Stewart, J.); see *id.* at 740-48 (opinion of Marshall, J.), and not on the distinction between a prior restraint and a subsequent penalty. Moreover, at least another two members of the majority also appear to have eschewed this distinction by relying on the fact that there is "no room for governmental restraint on the press," *id.* at 720 (opinion of Douglas, J., joined by Black, J.), whether it be by a criminal sanction, a damage remedy, or an injunction.

state courts to be libelous, totally suppressed continued publication of further issues of the newspaper.[51]

Ultimately, then, respondent's argument rests not on the distinction between injunctive relief and a damage remedy, but rather on the fact that the relief here was a *preliminary* injunction issued before a complete trial on the merits. However, if a preliminary injunction—necessarily based on a brief showing—had not been entered, respondent would have been denied all meaningful relief since a subsequent injunction, after extended dissemination of the book took place, would be a useless remedy. And, even if the *record* may be viewed as somewhat abbreviated and confused, the *procedures* employed were constitutionally sufficient. The preliminary injunction was entered only after "a judicial determination in an adversary proceeding," *Freedman* v. *Maryland*, *supra*, 380 U.S. at 58, before a state judge whose determination was upheld by two appellate courts in expedited proceedings. Hence, the likelihood of unjustified suppression of protected speech is far less than it was in *Marcus* v. *Search Warrants*, 367 U.S. 716 (1961), where wholesale seizure of books was permitted pursuant to a warrant secured *ex parte* and issued on probable cause, or *Carroll* v. *President and Commissioners of Princess Anne*, *supra*, where an injunction was issued solely on the basis of *ex parte* representations, or *Freedman* v. *Maryland*, *supra*, where an appointed censor decided whether to license allegedly obscene films. In short, if ever a *preliminary* restraint against publication was valid, it is the present one.

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[51] Petitioners argue that in *Near* the Court was also concerned with the use of an injunction to restrain continued dissemination of issues that had already been circulated. (Pet. Br. at 14.) While the *Near* Court did not explicitly address this issue, this Court has subsequently made clear that the injunction in *Near* was invalidated because it prohibited "dissemination of *future* issues of a publication because its *past* issues had been found offensive," *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 445 (1957) (emphasis supplied).

## CONCLUSION

For the foregoing reasons, *amici* submit that the writ of *certiorari* should be dismissed, or, in the alternative, that the decision of the New York Court of Appeals upholding the issuance of the preliminary injunction should be affirmed.

Respectfully submitted,

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* Counsel for *amici* gratefully acknowledge the assistance of Dr. Alan Stone, Professor of Law and Psychiatry at Harvard University. Counsel also wish to thank Trip Rothschild, Ellen Weissman, Sheryl Dicker and Michele Moss, student interns at the Center for Law and Social Policy, and James Rocap, a student at the Georgetown Law School.

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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No. 73-1446

JOAN ROE, PETER POE, AND COE PRESS, INC.,
*Petitioners,*

v.

JANE DOE,
*Respondent.*

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**On Writ of Certiorari to the Court of Appeals of the State of New York**

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## MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND TO APPEAR *PRO HAC VICE*

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[Member of the Bar of This Court]

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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## MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND TO APPEAR *PRO HAC VICE*

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

*Amici Curiae*, the American Psychiatric Association, the American Psychoanalytic Association, and the American Orthopsychiatric Association, respectfully move the Court for leave to participate in oral argument in the above entitled case, and further respectfully request that Paul Richard Friedman be permitted to appear *pro hac vice* to present oral argument on their behalf. The following reasons are submitted in support of this motion:

1. *Amici Curiae* filed with this Court a motion for leave to submit a brief *amici curiae* in the above-mentioned case, which was granted on October 21, 1974.

2. As indicated in *Amici's* brief in this case, *Amici* organizations represent more than 25,000 mental health professionals, primarily psychiatrists, who are concerned with the care and treatment of those in this country who need mental health assistance. As is set forth more fully in *Amici's* brief, unless patients in psychoanalytically-oriented psychotherapy are guaranteed confidentiality, this therapy cannot be successful, and patients will be unwilling to seek the psychotherapeutic treatment necessary for restoration of their mental health.

3. *Amici* also have a keen interest in the advancement of scientific learning through the publication of case studies. The case study is a unique method of presentation because it allows for detailed explication of therapeutic techniques in the context of real, rather than hypothetical, patient responses. Commencing with Freud, great contributions to our knowledge of mental processes have resulted from this form of presentation.

4. Should this Court decide to rule upon the merits at this time, *Amici* have valuable expertise which is relevant to the resolution of the conflict between the assurance of confidentiality required for effective psychotherapy and the ability to propagate ideas and further scientific knowledge through publication. Although *Amici* support respondent on the merits in this case, their legal analysis differs from respondent's in a number of important respects. *Amici* recognize the vital importance both of insuring confidentiality and of advancing scientific knowledge through the publication of case studies, and seek to assist the Court in resolving the conflict between these two interests so as to further each of them to the greatest extent possible.

5. However, *Amici* submit that because of the fundamental interests at stake and in view of the incompleteness of the record below, this Court should dismiss the writ of *ceritorari* either because the preliminary injunction issued below is not a final judgment as required for this Court's jurisdiction under 28 U.S.C. § 1257, or on the grounds that the writ of *certiorari* was improvidently granted. Neither petitioner nor respondent have addressed these important jurisdictional issues in their briefs.

6. Since *Amici* have raised jurisdictional issues which neither of the parties has addressed, they request that an additional fifteen minutes be granted so that they may participate in oral argument without utilizing the time presently allotted to the parties. Respondent has rejected *Amici's* request to share respondent's allotted time, but support this motion for leave to participate in oral argument with separate time.

7. *Amici* mental health organizations expressly request that Paul Richard Friedman present oral argument on their behalf.

8. Mr. Friedman graduated from Yale University Law School in June, 1970, and has been Managing Attorney of the Mental Health Law Project since 1972. He was admitted in 1972 to practice before the Courts of the District of Columbia and the United States Courts of Appeals for the District of Columbia Circuit and the Fifth Circuit. He is also a research candidate in training at the Baltimore-District of Columbia Institute for Psychoanalysis.

9. Mr. Friedman has been primarily responsible for the preparation of *Amici's* brief, and is the counsel most thoroughly acquainted with the cases, statutes and policies which support *Amici's* legal arguments.

Respectfully submitted,

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[Member of the Bar of This Court]

I, Joseph Onek, hereby certify that a copy of the foregoing Motion was mailed, postage prepaid, on this — day of October, 1974, to:

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